In the Supreme Court of the United States

No. 370

VINCENT SERMAN and LENINE STROLLO,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.


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Appendix (Attached):

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# In the Supreme Court of the United States

**OCTOBER TERM, 1967.**

**No. 320.**

VINCENT SERMAN and LENINE STROLLO,

*Petitioners,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners, Vincent Serman and Lenine Strollo, respectfully pray that, pursuant to paragraph 2 of Rule 58 of the Rules of the Supreme Court of the United States (effective October 2, 1967), that a rehearing be allowed by this Honorable Court of the order entered in this case on October 9, 1967, denying the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Petitioners respectfully show by this petition that circumstances of substantial, unusual and controlling nature, intervened between the time the petition for a writ of certiorari was filed in this Court (July 1, 1967) and the date the Government filed the brief in opposition (September 1, 1967).[1] The new matter is absolute proof that the

[1] Supreme Court Rule 24 (in effect at the time) prevented raising the matter by way of reply. This was new matter not raised by the Government in its brief although the Government had requested and was granted further time to include such matter.

District Court never employed the discretion required by Rule 33, Federal Rules of Criminal Procedure (Title 18, United States Code, Rule 33) [2] The Appeals Court below based its order on a finding that the district judge "did not abuse his discretion" [3] in denying the motion for new trial on newly discovered evidence. The state of mind of the district judge, at the time the original motion for new trial based on newly discovered and suppressed evidence was not known—the Court had simply overruled the motion on the theory that *he did not have jurisdiction.* (See appendix page 8a herein.) Hence, the appeal to the Court below was based on the *mistaken belief* by petitioners *and* the government, that the district judge had given the motion and supporting affidavits and sworn statement careful consideration.

## POINT I.

The Court of Appeals below did not have before it the correct position taken by the district court in passing on the motion for new trial on the grounds of newly discovered evidence. It is obvious, upon perusal of the transcript of the proceedings had before the district judge,[4] that he (the district judge) overruled the motion based on the erroneous conclusion that he did not have jurisdiction to entertain the motion under the rule (Rule 33, F. R. Cr. P.). The government had argued in the Court below that the district judge did not abuse his discretion—in fact, they argued further that the district court did not

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[2] The Rule is set out at page 5, petition for certiorari.

[3] See page 32, petition for certiorari.

[4] This transcript was taken at a hearing to show cause why bail should not be revoked (appendix pp. 7a-9a, herein) after the Court of Appeals had overruled such a motion (appendix p. 3a).

even have the necessary documents before the court![5] Therefore, the Court of Appeals was misled by the government's contention that the district court employed an allowable discretion.[6] Thus, it is clear that the district judge never employed an allowable discretion *at that time.* The district judge thought *he did not have jurisdiction.* (Transcript of proceedings on motion to show cause, pp. 7a-9a appendix, herein.)

## POINT II.

The district judge *did have jurisdiction to entertain* the motion under Rule 33, Federal Rules of Criminal Procedure, Title 18, United States Code; in fact, the Court *had jurisdiction to grant the motion.* This Honorable Court had denied petitions for rehearing on October 11, 1965 (382 U. S. 873) and petitioner Serman filed the motion for a new trial on the ground of newly discovered evidence (R. 29a-31a) on October 15, 1965; petitioner Strollo filed on October 28, 1965. On December 10, 1965, the district court denied the motions without a hearing and without a scintilla of government opposition to the motion and supporting affidavits.

The Rule clearly stated:

> "* * * if an appeal is pending the court *may grant* the motion only on *remand* of the case."

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[5] This is untenable, given the position taken by the district judge (pp. 7a-9a, appendix, transcript of proceedings before the district judge) and that taken by the Solicitor General in the brief in opposition before this Court, pages 6-8 of that brief.

[6] Namely, the discretion to overrule the motion for new trial upon consideration of the motion and supporting affidavits and sworn statement of defendants (petitioners), such having been submitted without government opposition at the district court level. (See petitioners' petition in this Court.)

The district judge is of the opinion that this part of the rule prevents him from even entertaining the motion except upon remand:

> The Court (District):
>
> "Now, the rule is clear and unequivocal, that when a case is on appeal, this Court has no jurisdiction over the case. And unless the Court of Appeals, *where your appeal is pending,* remands the case for this court to *hear your motion for a* new trial—that you are now taking to the Supreme Court—I have no jurisdiction at all in it." (Transcript p. 23; appendix page 8a.)

The district judge then went on to discuss his impression of the rule and then went on to ask:

> The Court (District):
>
> "Now how do you get around that. Have you read Rule 33? Neither one of you cited it to me.
>
> "Now, the only reason I am calling it to your attention is that when you people filed this, I naturally felt that it deserved my *fullest study and consideration.* But I ran immediately head-on into the provision of Rule 33: there was no remand; there wasn't anything for me to do but to overrule the motion." (Transcript p. 24; appendix pp. 8a-9a.)

Counsel then pointed out to the Court that *appeal was not pending* (transcript pp. 24, 25; appendix pp. 8a-9a). The district judge then "took the motion under advisement."

Clearly the district court erred. The government took the position that even if the allegations in the motion for new trial were accepted (page 6, government's brief in opposition) they are at most "peripheral and immaterial;" (this taken in the light of the fact that the government never contradicted or assailed the truth of the matters asserted in the motion and supporting affidavits), the government then contends that the "district judge * * * was

justified in rejecting, without a hearing, this ground for new trial." (page 8, government's brief in opposition.) It clearly appears now that the district judge rejected the motion and supporting affidavits without that "deserved * * * fullest study and consideration." Hence, petitioners were not only denied a hearing on the very grave charges involved at the district court level, but also without the slightest serious consideration by the district judge who was of opinion that he did not have jurisdiction to even entertain the motion.[7] Petitioners not only were denied their day in court on the serious matters asserted in the motion and supporting affidavits, but were denied even the slightest consideration of the matters. Surely the vice in this instant matter is as grave as that presented to this Court in *Carter v. Texas*, 177 U. S. 442.[8]

## POINT III.

The United States Court of Appeals, Sixth Circuit erred when it ordered the judgment of the district court affirmed on the ground that:

> "The district judge did not abuse his discretion in denying the motion for a new trial on newly discovered evidence."[9]

If the true facts were presented to that court, it would require a reversal, since that court would find that the district judge did not employ discretion when passing on the motions and supporting documents.

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[7] A review of petitioner's petition for writ of certiorari will illustrate the application of the settled principles on the matter of jurisdiction. Cf. *Surowitz v. United States*, 383 U. S. 363 (1966); *Remmer v. United States*, 347 U. S. 227, 229 (1954); see pages 12, 13, petitioner's petition for writ of certiorari.

[8] This case is discussed at pages 13-14, petition for writ of certiorari.

[9] See "order of the United States Court of Appeals for the Sixth Circuit" page 32, petition for writ of certiorari.

## CONCLUSION.

The government endeavors to minimize the importance of the inquiry from the very beginning of the proceedings now the subject of this appeal. At the district court level, the government was mute. At the appeals level the government took this position:

> 1st. that the appeal ought to be dismissed because the motions were not filed within two years of final judgment.
>
> 2nd. that the supporting documents were not filed properly.
>
> 3rd. that the appeal was pending too long.

At the Supreme Court level the government takes the position that even if accepted, these matters complained of quite clearly are "peripheral and immaterial;" (page 6, government's opposition brief) that "since the allegations in the motion for a new trial must be evaluated against the evidence at the trial * * *" (page 2) and "under such circumstances, the district court, which had observed the presentation and development of the evidence at the trial, did not abuse its discretion by denying the motions." (See pages 2 and 6, government's brief.)

Petitioners conclude that the district court in this particular case acted arbitrarily. (There are other examples of the district court's arbitrary disposition of matters of record in this case.) On October 6, 1967, the district judge reversed the position he took on July 14, 1967, and held that the matters of record on July 14, 1967, were "rhetorical" and "academic" and that he did not decide the matter on jurisdictional considerations! At the same time, the district judge found that the appeal to this court was not a "frivolous" appeal and that bail should be continued! Thus it would appear that the justice department and the district court are one. The matters com-

plained of are "peripheral and immaterial" and "academic."

For the substantial reasons set forth and in the interests of justice and the proper administration of justice in Federal Courts, petitioners respectfully pray that a rehearing be granted in this case.

Respectfully submitted,

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**CERTIFICATE OF COUNSEL.**

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58, Rules of the Supreme Court of the United States, effective October 2, 1967.

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